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No. 07-1017

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

CASTLE ROCK ESTATES, LLC,

Petitioner,

v.

THE STATE OF NEW JERSEY, THE DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY, THE TOWNSHIP OF WEST MILFORD, THE GOVERNING BODY OF THE TOWNSHIP OF WEST MILFORD, THE PLANNING BOARD OF THE TOWNSHIP OF WEST MILFORD AND JOHN DOES I THROUGH V, PERSONS AND/OR ENTITIES WHO COOPERATED, AND/OR PARTICIPATED IN THE WRONGS ALLEGED HEREIN BUT ARE AS YET UNIDENTIFIED,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bruce W. Padula, Esq.
Counsel of Record
SCARINCI & HOLLENBECK, LLC
1100 Valley Brook Avenue
Lyndhurst, NJ 07071
(201) 896-4100

Fred Semrau, Esq.
On the Brief
DORSEY & SEMRAU, LLC
714 Main Street
Boonton, NJ 07005
(973) 334-1900

Attorneys for Respondents The Township of West Milford and the Governing Body of the Township of West Milford

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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REASONS FOR DENYING THE PETITION

The Petitioner states that N.J.S.A. 13:20-35(b)(5) deprives them of due process pursuant to *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771 (1994). The New Jersey Appellate Division rejected Castle Rock's argument that the Highlands Act provides for the imposition of Administrative Penalties without any opportunity for pre-enforcement judicial review. N.J.S.A. 13:20-1 et seq. In fact, N.J.S.A. 13:20-35 specifically provides for such judicial review wherein in states:

> Recourse to any of the remedies available under this Section shall not preclude recourse to any of the other remedies prescribed in this Section or by any other applicable law.

Furthermore, counsel for the Petitioner fails to recognize that N.J.S.A. 13:20-35(b) only deals with violations to which the commissioner may require the person(s) in violation to comply with the provision or provisions violated or require the restoration of the area which is the site of the violation. It is clear that N.J.S.A. 13:20-35(b) does not deal with the imposition of civil administrative penalties. The appropriate section, which counsel for the Petitioner does cite in his submission, is N.J.S.A. 13:20-35(d).

The pertinent portion of N.J.S.A. 13:20-35(d) states:

> No assessment shall [not may] be levied pursuant to this section until after the party has been notified by certified mail or personal service. The notice shall...(4) affirm the rights of the alleged violator to a hearing. The ordered party shall have 20 days from receipt of the notice within which to deliver to the Commissioner a written request for a hearing. After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice. [emphasis added]

Thus, counsel for the Petitioner has misinterpreted the statute in question in his analysis presented to this Court. For instance, on page 7 of counsel's submission he states:

> Ironically, in relying upon the clear language of N.J.S.A. 13:20-35(d)(4), concerning notice of the rights of a violator to a hearing after the issuance of a notice of civil administrative penalty, the New Jersey Appellate Division acknowledged inferentially that an administrative hearing comes after an

> assessment of a civil administrative penalty. [emphasis added]

This is clearly an incorrect reading of the statute. As quoted above, N.J.S.A. 13:20-35(d) states at the end of the section:

> After the hearing and upon finding that a violation has occurred, the commissioner may issue a final order after assessing the amount of the fine specified in the notice...Payment of the assessment is due when a final order is issued or the notice becomes a final order. [emphasis added]

Again, the New Jersey Legislature has set forth clearly in the statute that no civil administrative penalty will be levied upon or become due for payment until after a final order is issued which would occur after the person is advised and afforded an opportunity for a hearing pursuant to that very same section!

Further, N.J.A.C. 7:38-1.5 sets forth specific regulations as it is entitled Requests for Adjudicatory Hearing and it specifically sets forth rules and regulations as to any person seeking to contest an assessment imposed pursuing a notice of administrative penalty assessment imposed pursuant to N.J.S.A. 13:20-35.

In addition to the administrative procedure set forth by the Highlands Act prior to issuing a final order of assessment, the New Jersey Appellate Division held that "the right to judicial review of any final decision by a State Administrative Agency is specifically protected by the New Jersey Constitution and implementing Court Rules." N.J. Const. art. VI, § 5, par. 4; R. 2:2-3(a)(2). *See* Appellate Division decision, Appendix to Petitioner's submission, A-17.

The Petitioner has failed to identify the appropriate appeal and assessment process as set forth in the laws of the State of New Jersey specifically by way of N.J.S.A. 13:20-35 in its entirety as well as the specific regulations set forth in N.J.A.C. 7:38-1.5. Petitioner's misreading of the relevant statutes has caused this unnecessary petition to be filed. The statutes are clear in their reading that prior to any levy of an assessment of a civil administrative penalty pursuant to N.J.S.A. 13:20-35(d), the person in violation is mandated to be both advised of his rights to a hearing and afforded an opportunity to request such a hearing to occur. The proper procedures are clearly set forth in the statute, thus not violating the Petitioner's due process rights.

CONCLUSION

In light of the above, particularly that the State of New Jersey has set forth a specific appeal procedure, one which provides an opportunity and hearing prior to finalizing any Administrative Penalty, we respectfully request that the Court deny the Petition for Writ of Certiorari.

Bruce W. Padula, Esq.
Counsel of Record
Scarinci & Hollenbeck, LLC
1100 Valley Brook Avenue
Lyndhurst, NJ 07071
(201) 896-4100

Fred Semrau, Esq.
On the Brief
Dorsey & Semrau, LLC
714 Main Street
P.O. Box 228
Boonton, NJ 07005
(973) 334-1900
Attorneys for Respondents, The Township of West Milford and the Governing Body of the Township of West Milford